Supreme Court, U.S.

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No. _____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

GEORGE RAYMOND ANDERSON,

Petitioner,

v.

ELECTRONIC DATA SYSTEMS CORP.,
DOUGLAS M. CROW,
ANTHONY E. WEYNAND,
RICHARD P. SHLAKMAN,
and DARRELL JOHNSON,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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49 pp

QUESTIONS PRESENTED

I. Whether it is error to find that a plaintiff's state law cause of action for wrongful discharge for refusing to violate certain federal and state laws including the Employee Retirement Income Security Act ("ERISA") and reporting certain violations of such laws "relates to" ERISA.

II. Whether it is error to apply the doctrine of complete preemption as relates to ERISA, instead of the well-pleaded complaint rule, regardless of whether the claims relate to ERISA, where the claims asserted in plaintiff's state law petition do not fall within the scope of ERISA's civil enforcement provision, § 502(a).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 11 F.3d 1311 (5th Cir. 1994) and is reprinted in the Appendix to this Petition, at A1-A12. The Memorandum Order granting the Respondent Summary Judgment and the Order denying Petitioner's Motion to Remand, issued by the United States District Court for the Northern District of Texas, Dallas Division, are also reprinted in the Appendix to this Petition at B1-B9 and C1 respectively.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit (Appendix A) was entered on January 24, 1994. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This matter involves various provisions of the Employee Retirement Income Security Act, 29 U.S.C.S. § 1001 *et seq.*, including the following:

29 U.S.C. § 1132(a) [ERISA § 502 (a)] provides in pertinent part:

> (a) Persons empowered to bring a civil action. A civil action may be brought –
>
> (1) by a participant or beneficiary –

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USCS § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (l).

29 U.S.C. § 1140 [ERISA § 510] provides:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the

> provisions of an employee benefit plan, this title, section 3001 [29 USCS § 1201], or the Welfare and Pension Plans Disclosure Act, or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this title, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this Act or the Welfare and Pension Plans Disclosure Act. The provisions of section 502 [29 USCS § 1132] shall be applicable in the enforcement of this section.

29 U.S.C. § 1144(a) [ERISA § 514(a)] provides:

> (a) Supersedure; effective date. Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] and not exempt under section 4(b) [29 USCS § 1003(b)]. This section shall take effect on January 1, 1975.

STATEMENT OF THE CASE

(1) Court Proceedings and Disposition in Courts Below:

Procedurally, the instant case comes before this Court following a court of appeals' affirmance of a district court's award of summary judgment to Respondent.

The Petitioner, George Raymond Anderson, commenced this action in the District Court of Dallas County, Texas on June 26, 1991. The Petitioner named as defendants the following parties: Electronic Data Systems Corporation (hereinafter referred to as "Respondent" or "EDS"), Douglas M. Crow (hereinafter referred to as "Crow"), Anthony E. Weynand (hereinafter referred to as "Weynand"), Richard P. Shlakman (hereinafter referred to as "Shlakman"), and Darrell Johnson (hereinafter referred to as "Johnson"). Respondent, along with other defendants in this case, removed Petitioner's action to the United States District Court for the Northern District of Texas, Dallas Division (the "District Court"), on July 25, 1991. The basis for removal, as contended by Respondent, was that Petitioner had asserted, on the face of his pleading, a claim for wrongful discharge arising under the Employee Retirement Income Security Act ("ERISA"). Petitioner filed Plaintiff's First Amended Complaint in the District Court on October 21, 1991. Petitioner asserted causes of action against Respondent and the other defendants for (1) wrongful discharge pursuant to Texas state law, (2) intentional infliction of emotional harm, (3) negligent infliction of emotional harm, (4) tortious interference, and (5) breach of contract. Respondent, collectively with Weynand, Shlakman, and Johnson, filed its Answer to Plaintiff's First Amended Complaint on October 31, 1991 in the District Court. Crow filed his Answer to Plaintiff's First Amended Complaint on November 14, 1991 in the District Court.

On November 15, 1991, Crow filed a Motion for Summary Judgment against Petitioner. Petitioner filed his Response to Crow's Motion for Summary Judgment on

December 5, 1991. Petitioner also filed, on December 5, 1991, his Motion to Remand requesting that the District Court remand his action to the 191st Judicial District Court of Dallas County, Texas.

EDS, Weynand, Shlakman and Johnson responded to Petitioner's Motion to Remand on December 30, 1991. Crow joined in that Response to Petitioner's Motion to Remand on December 30, 1991. The District Court denied Petitioner's Motion to Remand on January 7, 1992.

Crow filed a Supplemental Motion for Summary Judgment on June 1, 1992. The District Court granted Crow's Motion for Summary Judgment on December 12, 1992. Petitioner filed Plaintiff's Second Amended Complaint in the District Court on April 13, 1993. On or about May 4, 1993, EDS filed in the District Court its Motion for Summary Judgment. The District Court granted Respondent's Motion for Summary Judgment on June 4, 1993. The District Court also made various other rulings during the course of proceedings in this case which affected the parties hereto and the issues involved.

Petitioner filed his Notice of Appeal with the United States Court of Appeals for the Fifth Circuit on June 30, 1993. The basis of the appeal was that the District Court erred in denying Petitioner's Motion to Remand. The Fifth Circuit rendered its opinion on January 24, 1994, affirming the judgment of the District Court.

(2) Statement of Facts:

Petitioner was hired by Respondent, EDS, on October 15, 1984 whereupon Petitioner assumed a managerial

position in the Domestic Treasury Department of EDS. (Plaintiff's Response to Motion for Summary Judgment of Defendant, EDS, (hereinafter "Plaintiff's Response"), p. 3, No. 3). Petitioner's job performance was consistently judged to be adequate or superior by his supervisors and others, and he received numerous commendations on his job performance at EDS. (Plaintiff's Response, p. 5, No. 6). In October, 1985 Anderson was promoted by EDS to the position of Manager of Investments and Debt in the Domestic Treasury Department wherein Petitioner was responsible for all domestic short and long term investments for all EDS pension portfolios, corporate portfolios, and Title IX portfolios. (Plaintiff's Response, p. 4, No. 5).

On August 23, 1989 Petitioner was terminated from his employment with EDS. (Plaintiff's Response, p. 18, No. 21). In response, Petitioner filed Plaintiff's Original Petition in the District Court of Dallas County, Texas, on June 26, 1991. Therein, Petitioner alleged five (5) claims against the Respondent and various employees of the Respondent including wrongful discharge, intentional and/or negligent infliction of emotional harm, tortious interference, and breach of contract. The gravamen of Petitioner's complaint was that Petitioner had been wrongfully discharged as a result of his refusal to violate certain laws, including, but not limited to, certain provisions of ERISA. (Plaintiff's Original Petition, p. 5). The alleged illegal acts which the Petitioner was instructed to perform can be summarized as follows:

1. Petitioner was instructed to sign, on two (2) separate occasions, approval of payment of invoices without approval of the pension trustees;

2. Petitioner was instructed to intentionally fail investment transactions made on behalf of EDS;

3. Petitioner was instructed to write up minutes for meetings which he did not attend in connection with the EDS retirement plan; and

4. Petitioner was instructed to falsify interest income projections.

As a basis for removing this action to the United States District Court, Respondent and the other defendants improperly relied upon the references to ERISA and filed for removal alleging Petitioner's Petition constituted "a cause of action for retaliatory discharge for reporting ERISA violations." (Defendants' Civil Cover Sheet). Thereafter, Petitioner filed Plaintiff's First Amended Original Complaint wherein all references to ERISA were removed. Petitioner also filed Plaintiff's Motion to Remand and a Brief in Support wherein Petitioner argued the mere references to ERISA were insufficient to invoke federal question jurisdiction. (Brief in Support of Plaintiff's Motion to Remand, p. 2). Petitioner also argued that the filing of Plaintiff's First Amended Complaint, which eliminated references to ERISA, eliminated any possible federal question jurisdiction. (Brief in Support of Plaintiff's Motion to Remand, p. 2). Similarly, based on Petitioner's assertion that this action was improperly removed to the United States District Court, the District Court did not have proper jurisdiction to render any decisions in this case, including, but not limited to, those pertaining to the summary judgment motion of the Respondent.

ARGUMENT

Rule 10 of the Revised Rules of the Supreme Court of the United States provides in part that a Petition for a Writ of Certiorari may be granted when a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way which conflicts with applicable decisions of this Court. Rule 10 also recognizes that the Rule itself is neither controlling nor fully measures the Court's discretion with respect to granting writs.

In this case, Petitioner contends that the District Court erred in finding that his state law cause of action for wrongful discharge for refusing to violate certain federal and state laws (including ERISA) and reporting certain violations of such laws "relate to" ERISA. Similarly, regardless of whether the District Court erred in finding that Petitioner's state law cause of action "relates to" ERISA, the District Court erred in applying the doctrine of complete preemption instead of the well-pleaded complaint rule. Because the claims asserted by Petitioner do not fall within the scope of ERISA's civil enforcement provision, the application of complete preemption was improper.

PROPOSITION I

THE DISTRICT COURT IMPROPERLY DETERMINED THAT THE PETITIONER'S CLAIMS WERE RELATED TO ERISA.

Although this Court has given expansive construction to ERISA provisions, this Court has also recognized

limits to ERISA's preemption clause. *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Mackey v. Lanier Collection Agency & Ser., Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). This Court has held "[t]he mere existence of a federal regulatory or enforcement scheme, however, even a considerably detailed one, does not by itself imply preemption of state remedies." *McClendon*, 498 U.S. at 143, 111 S.Ct. at 485 (citing *English v. General Elec. Co.*, 496 U.S. 72, 87, 110 S.Ct. 2270, 2279, 110 L.Ed.2d 65 (1990)). Moreover, this Court has declared "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law relates to the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n. 21, 103 S.Ct. 2890, 2901 n. 21, 77 L.Ed.2d 490 (1983). The Petitioner's case is exactly the sort of state action referenced in *Shaw*.

The claims asserted by Petitioner in this case require neither a construction of federal law nor the resolution of a substantial question of federal law. In its opinion below, the Fifth Circuit recognized that Petitioner's state court petition alleged no federal cause of action. *Anderson v. Electronic Data Systems Corp.*, 11 F.3d at 1311, 1313 (5th Cir. 1994), reprinted *infra* at A5. As such, removal was improper. Only where the plaintiff's complaint clearly establishes that the claim is one necessarily arising under federal law will the federal issue suffice to support removal to federal court. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1,11, 103 S.Ct. 2841, 2486-87, 77 L.Ed.2d 420 (1983).

In *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988), Willy sued his former employer for wrongful discharge

arising from Willy's refusal to violate federal environmental and securities laws and for reporting his employer's violation thereof. In finding that the District Court erred in denying Willy's motion to remand, the Fifth Circuit stated:

> Our conclusion in this connection is strengthened by our view that the federal issues in Willy's claim are not ones in the forefront of the case, but are more collateral in nature, and are not substantial in relation to the claim as a whole, which is in essence one under state law. *The Texas common law doctrine stated in Sabine Pilot is one intended to protect the rights of any employees, and whether the law that they are fired for refusing to violate is state or federal, environmental or otherwise, is wholly immaterial.*

Id. at 1170. (Emphasis added). The Fifth Circuit thus directed the district court to remand the case to state court. *Id.*

In *Sperling v. Texas Health Enterprises, Inc.*, 791 F.Supp. 662 (S.D. Tex. 1992), the court determined that the plaintiffs' claims for wrongful discharge arising from plaintiffs' refusal to participate in their former employer's injury plan did not "relate to" ERISA so as to support removal. *Sperling*, 791 F.Supp. at 664-665. Noting only state laws that "relate to" an ERISA plan are preempted by ERISA, the *Sperling* court found ERISA did not have a preemptive effect on the plaintiffs' claims despite that the employees' claim required consideration of evidence regarding the terms of their employer's ERISA plan. *Sperling*, 665 F.Supp. at 664-665. *See also, Nowoc v. Rheem Mfg. Co.*, 772 F.Supp. 977 (S.D. Tex. 1991) (Where ERISA is a collateral issue in a wrongful termination case, removal is

improper since the wrongful termination is a matter decided by Texas employment law); and *Zack v. Howard*, 658 F.Supp. 73 (N.D. Ill. 1987) (Fact that plaintiff's complaint made explicit reference to federal statutes not sufficient to warrant removal).

Respondent and other defendants sought removal of this action on the basis that Petitioner's claims arose under federal law. However, all the claims asserted by Petitioner were based solely on Texas state law. Specifically, Petitioner's wrongful discharge claim is based on Texas state employment law which allows the plaintiff recovery where an employer has discharged an employee for refusing to violate a law. *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W.2d 733 (Tex. 1985). With respect to recovery pursuant to *Sabine Pilot*, the type of law (e.g. state v. federal) which the employee refuses to violate is immaterial. *Willy*, 855 F.2d at 1170. Nonetheless, the Respondent, in the Defendants' Response to Plaintiff's Motion to Remand, misconstrued Petitioner's Petition as one alleging "wrongful discharge arising under § 510 of ERISA, 29 U.S.C. § 1140." Respondent based this argument on the fact that Petitioner's wrongful discharge claim is grounded, in part, on Petitioner's refusal to violate certain laws, including ERISA laws governing management of ERISA pension plans. However, ERISA is only relevant insofar as it was one of the types of laws Petitioner refused to violate. As such, it is purely collateral and incidental to Petitioner's claims.

Petitioner's Original Petition refers to ERISA as one of the laws Petitioner refused to violate, thereby resulting in Petitioner's wrongful discharge. However, it is clear that such reference does not constitute grounds for

removal unless such reference requires resolution of a substantial federal question. *Franchise Tax Bd.*, 463 U.S. at 10, 103 S.Ct. at 2847. Under the well-pleaded complaint rule, it is clear that Anderson's claims are not removable because the claims, as read from the face of the Original Petition, do not require resolution of any substantial federal question.

Respondent has attempted to equivocate wrongful termination, a common law cause of action grounded solely in state law, with violations of substantive ERISA law. However, in no way can it be said that Petitioner's refusal to violate ERISA constitutes a "substantially federal" question as is required for removal under *Franchise Tax Board*. Whether Petitioner was wrongfully terminated for refusal to break a state law or federal law does not change the fact that Petitioner's wrongful termination is a state law claim; in no way, shape, or form is Petitioner's claim a federal question. Thus, it is clear Petitioner's claims were not properly subject to removal and the District Court's refusal to remand said claims constitutes a clear error of law.

PROPOSITION II

THE FIFTH CIRCUIT ERRED IN FAILING TO APPLY THE "WELL PLEADED COMPLAINT" RULE BY IMPROPERLY RELYING ON *TAYLOR* TO FIND THE COMPLETE PREEMPTION DOCTRINE APPLICABLE.

In its opinion below, the Fifth Circuit relies on *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987), to find that Petitioner's claim was subject to removal jurisdiction. *Anderson*, 11 F.3d at 1315,

reprinted *infra* at A9-A10. Specifically, the Fifth Circuit stated that in *Taylor*, this Court ruled that "causes of action within the scope of the civil enforcement provisions of ERISA § 502(a) are subject to the complete preemption doctrine and removable to federal court." *Id.* (citing *Taylor*, 481 U.S. at 66-67, 107 S.Ct. at 1548). Pursuant to the complete preemption doctrine, the Fifth Circuit found Petitioner's claim was removable to federal court. *Anderson*, 11 F.3d at 1315, reprinted *infra* at A10.

However, it is important to note that the complete preemption doctrine espoused by this Court in *Taylor* is confined to causes of action which fall within the civil enforcement provisions of ERISA § 502(a). *Taylor*, 481 U.S. at 66, 107 S.Ct. at 1548. In *Taylor*, the plaintiff, a car accident victim, sought to recover benefits under an employee benefit plan covered by ERISA. After a dispute arose regarding plaintiff's rights under the ERISA plan, plaintiff sued in state court to recover disability benefits. The plaintiff further asserted state law claims for compensation for mental anguish, wrongful termination, and wrongful failure to promote. *Taylor*, 481 U.S. at 61, 107 S.Ct. at 1545. Although recognizing the plaintiff had asserted only state law causes of action, this Court found that the plaintiff's claims in *Taylor* fell within the scope of ERISA § 502(a)(1)(B). *Taylor*, 481 U.S. at 63-64, 107 S.Ct. at 1546.

In deciding whether removal jurisdiction is proper, this Court in *Taylor* recognized that "the 'well-pleaded complaint rule' is the basic principle marking the boundaries of the federal question jurisdiction of the federal courts." *Taylor*, 481 U.S. at 63, 107 S.Ct. at 1546 (citing *Franchise Tax Bd.*). This Court further recognized that "a

cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Id.* (citing *Gully v. First Nat. Bank*, 299 U.S. 109 (1936); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149 (1908)). This Court also noted that "[f]ederal preemption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court." *Id.* This Court recognized, however, one corollary of, or exception to, the well-pleaded complaint rule is that "Congress may so completely preempt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Taylor*, 481 U.S. at 63-64, 107 S.Ct. at 1546.

In *Taylor*, this Court found that the text and the legislative history of ERISA shows clear congressional intent to make "§ 502(a)(1)(B) suits brought by participants and beneficiaries federal questions for the purposes of federal court jurisdiction. . . . " *Taylor*, 481 U.S. at 66, 107 S.Ct. at 1547. Because Congress manifested such an intent to make any causes of action within the scope of ERISA § 502(a) removable to federal court, the plaintiff's claims in *Taylor*, which fell within ERISA § 502(a)(1)(B), were deemed properly removable by this Court. *Taylor*, 481 U.S. at 66-67, 107 S.Ct. at 1548.

In analyzing this Court's holding in *Taylor*, it is vital to note that application of the complete preemption doctrine is restricted only to those cases where a plaintiff's claims fall within the scope of ERISA § 502(a) so as to create a claim sufficiently federal in character. Thus, removability under *Taylor* requires: (1) that the state law claims asserted in the complaint are preempted by

ERISA; and (2) the state law claims fall within the scope of the civil enforcement provision of ERISA, § 502(a). *Taylor*, 481 U.S. at 64-66, 107 S.Ct. at 1546-48. Stating the standard another way, *Taylor* requires that "a state law cause of action designed to remedy a particular wrong and preempted by ERISA is not removable unless ERISA provides a civil remedy for the wrong as well." *McLean v. Carlson Companies, Inc.*, 777 F.Supp. 1480, 1482 (D. Minn. 1991) (citing *Taylor*, 481 U.S. at 64-66, 107 S.Ct. at 1547). In this respect, it is helpful to refer to the decision in *Franchise Tax Bd.* wherein this Court found that ERISA preemption, without more, will not convert a state claim into an action arising under federal law. *Franchise Tax Bd.*, 463 U.S. at 25-27, 103 S.Ct. at 2854-2855.

As the Fifth Circuit recognized in its opinion below, Petitioner alleged no federal cause of action in his state court petition. *Anderson*, 11 F.3d at 1313, reprinted *infra* at A5. Moreover, as more fully set forth below in Proposition III, Petitioner's state law claims do not fall within the scope of the civil enforcement provision of ERISA, § 502(a). In order for removal of Petitioner's claims to be appropriate under the doctrine of complete preemption, *Taylor* requires: (1) that Petitioner's state law claims, as set forth in Petitioner's state court petition, are preempted; and (2) that Petitioner's state law claims fall within the scope of ERISA's civil enforcement provision, § 502(a). In Petitioner's case, it is clear that the second prong of the complete preemption test, as set forth in *Taylor*, is not satisfied; Petitioner's state law claims for wrongful discharge, intentional and/or negligent infliction of emotional harm, tortious interference, and breach of contract, do not fall within the scope of ERISA § 502(a).

Because the complete preemption doctrine is inapplicable to Petitioner's case, it is clear that the Fifth Circuit erred in not applying the well-pleaded complaint rule.

PROPOSITION III

PETITIONER'S CLAIMS DO NOT FALL WITHIN THE SCOPE OF ERISA § 502(a) OR § 510.

It is axiomatic that ERISA § 502(a) provides no cause of action whatsoever for wrongful discharge for refusing to violate ERISA and reporting violations of ERISA. In its opinion below, the Fifth Circuit intimates that Petitioner, as a participant and fiduciary with respect to an ERISA plan, is afforded a right or remedy pursuant to ERISA § 502(a). *Anderson*, 11 F.3d at 1314, reprinted *infra* at A7. However, the Fifth Circuit failed to state which section of § 502(a), if any, would be applicable to Petitioner's claims. The fact of the matter is that Petitioner's claims do not fall within the scope of ERISA § 502(a).

Turning first to ERISA §§ 502(a)(5) and (6), it is clear those sections apply only to civil enforcement by the Secretary of Labor, and as such, such provisions are plainly inapplicable to the case at bar. Further, it is clear that Petitioner's claims have nothing to do with an administrator's Internal Revenue registration, and as such, ERISA § 502(a)(4) is also inapplicable to this case.

Next, it must be considered whether Petitioner's claims fall within the scope of § 502(a)(1). ERISA § 502(a)(1) permits a beneficiary's or participant's access to ERISA plan information and allows a beneficiary or participant to bring an action to: recover his benefits under the plan; enforce his rights under the terms of the

plan; or to clarify his rights to future benefits under the plan. Even if Petitioner was a participant and a fiduciary with respect to an ERISA plan, ERISA § 502(a)(1) is not applicable to Petitioner's case. Petitioner brought suit against Respondent for state law wrongs arising from Petitioner's wrongful discharge for refusing to violate state and federal laws and for reporting certain violations of such laws. Petitioner's claims have nothing to do with recovery of benefits under a plan, enforcing Petitioner's rights as a participant under a plan, or clarifying future rights or benefits under a plan. As such, Petitioner's claims simply do not fall within the scope of ERISA § 502(a)(1).

Further, Petitioner's claims do not fall within the scope of ERISA § 502(a)(2) which permits the Secretary of Labor, a participant, beneficiary, or fiduciary to sue for a breach of fiduciary duty pursuant to ERISA § 409, 29 U.S.C. § 1109. Clearly, Petitioner is not suing for a breach of fiduciary duty and as such, ERISA § 502(a)(2) is inapplicable to the case at bar.

Finally, it is equally clear that Petitioner's claims do not fall within the scope of ERISA § 502(a)(3). Specifically, ERISA § 502(a)(3) provides that a civil action may be brought, "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan."

In this case, Petitioner is not seeking to enjoin any act or practice which violates the provisions of ERISA, nor is

Petitioner seeking to obtain any equitable relief to redress ERISA violations or to enforce ERISA provisions. Petitioner has simply sought money damages arising from his wrongful discharge for refusing to violate state and federal laws and for reporting certain violations of such laws.

With respect to the scope of ERISA § 502(a)(3), it is helpful to refer to the court's analysis in *McLean v. Carlson Companies, Inc.*, 777 F.Supp. 1480 (D. Minn. 1991). In *McLean*, the plaintiff sued her employer pursuant to a Minnesota whistle-blower statute (Minn. Stat. § 181.932) for wrongful discharge for reporting purported ERISA violations to her employer. *McLean*, 777 F.Supp. at 1481. In determining whether the plaintiff's claims fell within the scope of § 502(a)(3), the *McLean* court noted, "the parties have not cited, and the court has not found, an ERISA provision which provides plaintiff the specific right to report violations of federal law to her superiors or those responsible for the plan's administration." *McLean*, 777 F.Supp. at 1484. Ultimately, in order to satisfy the complete preemption doctrine as set forth in *Taylor*, the *McLean* court was forced to infer that ERISA provided a cause of action for "whistle-blowing" with respect to ERISA violations. To be sure, there is no such relief provided in ERISA. Giving all due deference to the *McLean* court, even if ERISA impliedly provides a remedy for "whistle-blowing", it does not stand to reason that it also provides a remedy for termination for the refusal to violate ERISA. To imply that ERISA also supplies a remedy for discharge for refusing to violate ERISA goes well beyond the realm of reason. Because Congress chose not to provide employees a cause of action under ERISA for

wrongful discharge for refusing to violate ERISA, courts cannot do so.

Based on the foregoing, it is clear that the Petitioner's claim for wrongful discharge for refusing to violate state and federal laws and for reporting certain violations of such laws does not fall with the scope of ERISA § 502(a). This being the case, it is clear that the complete preemption test set forth in *Taylor* has not been satisfied.

In discussing the import of ERISA § 510, the Fifth Circuit relied heavily on this Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). Therein, the plaintiff alleged he was discharged, in part, because his employer was attempting to avoid making contributions to the plaintiff's pension plan. *McClendon*, 498 U.S. at 135-36, 111 S.Ct. at 481. As the Fifth Circuit noted in its opinion below, this Court found that the plaintiff's claim in *McClendon* fell squarely within the purview of ERISA § 510. Considering that ERISA § 510 prohibits the discharge of a plan participant "for the purpose of interfering with the attainment of any right to which a participant may become entitled under the plan, this title . . . ," this Court's conclusion in *McClendon* was plainly correct because the employee's discharge constituted interference with that employee's rights under the employee benefit plan involved therein.

In its opinion below, the Fifth Circuit did a fine job summarizing the import of ERISA § 510, stating "§ 510 addresses discharges for exercising ERISA rights or for the purpose of interfering with the attainment of ERISA rights, as well as discharges for providing information or testimony relating to ERISA." *Anderson*, 11 F.3d at 1315,

reprinted *infra* at A7-A8. The Fifth Circuit went on to hold that just as the plaintiff's claim in *McClendon* fell within the scope of ERISA § 510, so too did Petitioner's. *Id.* at 1314, reprinted *infra* at A7. However, based on the Fifth Circuit's own construction of § 510, it is axiomatic that Petitioner's claim does not "fall squarely within the ambit of ERISA § 510." Petitioner's claims do not arise from a discharge for exercising ERISA rights. Petitioner's claims do not arise from a discharge for the purpose of interfering with the attainment of ERISA rights. Petitioner's claims do not arise from a discharge for providing information or testimony related to ERISA. Rather, Petitioner's claims did arise from a discharge for refusing to violate state and federal law and reporting certain violations of such laws. As such, it is clear Petitioner's claims do not come within the scope of ERISA § 510 and that therefore, ERISA § 510 is not applicable. Petitioner concedes that ERISA § 510 would be applicable if Petitioner's state law petition was filed against Respondent to correct what Petitioner perceived to be violations of ERISA. However, such is not the case. Rather, as mentioned above, Petitioner's claims arose from a discharge for refusing to violate state and federal laws and reporting certain violations of such laws.

Because Petitioner's claims clearly do not fall within the scope of either ERISA § 502(a) or § 510, as explained fully above, the Fifth Circuit has, by improperly applying the doctrine of complete preemption in this case, left Petitioner without any remedy. As such, Petitioner is entitled to relief from this Court.

CONCLUSION

To understand the impact of the Fifth Circuit's opinion in *Anderson* is to realize that whenever an employee suing for wrongful discharge so much as mentions "ERISA" in his or petition, that cause of action must be removed to federal court. Yet even more disturbing is the realization that under the Fifth Circuit's construction of ERISA provisions, an employer-defendant may remove a wrongful discharge cause of action to federal court merely by referring to ERISA in its answer. What is still more egregious about the Fifth Circuit's opinion in *Anderson* is that under *Anderson*, a plaintiff may be foreclosed from his or her sole remedy where: (1) a defendant removes the cause of action pursuant to ERISA preemption; and (2) ERISA provides neither a claim, nor relief for the wrong.

The Congress intended for ERISA to be afforded broad application and the courts have generally adhered to this intent. However, to suggest that the Congress intended ERISA to apply to state law claims for wrongful discharge based on a refusal to violate state and federal laws, including ERISA provisions, is an extension that cannot be supported.

In its opinion below, the Fifth Circuit found that Petitioner's claims were removable pursuant to *Taylor*. In so finding, the Fifth Circuit necessarily had to find that the Petitioner's claims fall within the scope of ERISA's civil enforcement provision, § 502(a). Plainly, the Petitioner's state law claims for wrongful discharge for refusing to violate state and federal laws do not fall within the

scope of ERISA § 502(a). As such, the complete preemption doctrine, as espoused in *Taylor*, is inapplicable to Petitioner's case. Therefore, as to the Petitioner's claims, the "well-pleaded complaint rule" governs removability. The Fifth Circuit explicitly concedes that Petitioner's state court petition did not allege any federal causes of action. Therefore, the Fifth Circuit's failure to remand Petitioner's causes of action to state court as required by the well-pleaded complaint rule constitutes clear error which requires the review of this Court.

In light of the foregoing, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

George Raymond ANDERSON, a/k/a Andy Anderson, Plaintiff-Appellant,

v.

ELECTRONIC DATA SYSTEMS CORP., et al., Defendants-Appellees.

No. 93-1606
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Jan. 24, 1994.

Former employee brought suit against former employer and coemployees for wrongful discharge, and asserted other state common-law claims. Defendants removed action from Texas state court. Summary judgment was granted in favor of defendants by United States District Court for the Northern District of Texas, A. Joe Fish, J., with regard to claims that were not voluntarily dismissed, and former employee appealed. The Court of Appeals, Reavley, Circuit Judge, held that: (1) claims that former employee was demoted and discharged for refusing to commit illegal acts and for reporting the activity of another employee, which involved pension plans, were preempted by ERISA, and (2) former employee's claim of demotion and termination for failing to commit acts in violation of ERISA and reporting such violations fell within scope of civil enforcement provisions of ERISA, creating removal jurisdiction, even though preemption was raised only as defense.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

REAVLEY, Circuit Judge:

George Anderson brought this suit in state court against his former employer, Electronic Data Systems Corporation (EDS), and others. He asserted state common law causes of action for wrongful discharge, tortious interference with prospective business and contractual relationships, and infliction of emotional distress. The defendants removed the case to federal court and were either voluntarily dismissed or obtained summary judgments. On appeal, Anderson does not directly challenge the summary judgments, but instead asks us to vacate the judgments and direct the remand of the case to state court, on grounds that the district court lacked subject matter jurisdiction. Because we conclude that the district court had jurisdiction by virtue of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461, we affirm.

BACKGROUND

Anderson's suit was originally filed in Texas state court against EDS and four present or former EDS employees. His state court petition asserted numerous facts and claims on which our analysis of jurisdiction rests. Regarding the general nature of his employment with EDS, the petition alleges:

> On October 15, 1984, Anderson was employed by Defendant EDS for a managerial position in the Domestic Treasury Department of Defendant EDS. From October 1984 to October 1985, Anderson served as the Cash Manager in the Domestic Treasury Department, where his responsibilities included management of all cash operations, short term investments, cash forecasting, and related information systems plus consulting with various groups within the EDS system. In October of 1985, Plaintiff was promoted to [the] position of Manager of Investments and Debt in the Domestic Treasury Department. In that position, Plaintiff had responsibilities for all domestic short and long-term investments for all pension portfolios, corporate portfolios, and Title IX portfolios. In this position, Plaintiff was charged with the responsibility of administering investment assets totaling approximately 1.3 billion dollars.

The petition alleges that Anderson was demoted and discharged for his refusal to commit illegal acts and for reporting the activities of another employee, Douglas Crow. It asserts that Anderson was asked by Crow to commit certain illegal acts, and gives four examples. Two of the examples involved the EDS pension plans. Anderson claimed that the illegal acts included:

> Being asked to sign on two separate occasions approval or payment invoices on behalf of the pension portfolios under his management and supervision who [sic] had been retained by Crow without approval of the pension trustees. Such action would have been a violation of the Federal Employee Retirement Income Security

> Act of 1974 ("Erisa") Laws governing management of such pension plans.
>
> * * *
>
> Plaintiff was also asked to write up minutes for meetings which he did not attend in connection with the EDS Retirement Plan. This also is in violation of ERISA.

The petition alleges that Anderson refused to commit these acts, and reported these incidents and other improper conduct by Crow to management. It further alleges that Anderson was demoted and then discharged because of his "refusal to commit illegal activities at Crow's request and because of his reporting Crow's own illegal or irregular activities to EDS Management." The petition asserted a cause of action for wrongful discharge, on the theory that under Texas law employment-at-will contracts cannot be terminated because of the employee's refusal to commit an illegal act. *See Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 735 (Tex.1985).

The defendants removed the case to federal court. Anderson filed an amended complaint deleting all references to ERISA. Defendant Crow filed a motion for summary judgment, which the court granted. Anderson moved to remand the case to state court in conjunction with filing his response to Crow's summary judgment motion. Anderson later dismissed all other defendants except EDS, and dismissed all claims except for the wrongful discharge claim. The district court denied the motion to remand and granted summary judgment as to the remaining claim.

On appeal Anderson does not challenge the summary judgments on the merits. Instead, he claims that the district court lacked subject matter jurisdiction, and asks that we vacate the summary judgments entered by the district court and direct the remand of the case to state court.

DISCUSSION

The state court petition did not allege any federal causes of action. EDS claims that the case was properly removed by virtue of the federal preemption afforded by ERISA. We are hardly writing on a clean slate, as the subject of federal preemption under ERISA has generated a wealth of jurisprudence. We face two related questions. The first is whether the claims asserted by Anderson are preempted by ERISA. The second is whether ERISA's "total preemption" doctrine applies to create federal question jurisdiction which will support removal of the case to federal court.

The Supreme Court's decision in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), provides guidance to our case. There, an employee brought a state court action against his employer alleging wrongful discharge. The employee claimed that one of the reasons for his discharge was the employer's desire to avoid making contributions to his pension plan, which allegedly would have vested in another four months. The case eventually reached the Texas Supreme Court, which held that a plaintiff could recover in a wrongful discharge action if he established that the principal reason for his

termination was the employer's desire to avoid contributing to its pension plan. *Id.*, 498 U.S. at 135-36, 111 S.Ct. at 481. The United States Supreme Court reversed, holding that such a cause of action was preempted by ERISA's broad preemption provision, ERISA § 514, 29 U.S.C. § 1144, which preempts state laws which "relate to" an ERISA benefit plan. The Court reaffirmed its prior decisions noting that the preemption provision is "deliberately expansive" and "designed to 'establish pension plan regulation as exclusively a federal concern,' " and that a law relates to an ERISA plan "if it has a connection with or reference to such a plan." 498 U.S. at 139, 111 S.Ct. at 482-83 (citations omitted). The Court found that the wrongful discharge claim related to an ERISA plan and was hence preempted since "the existence of a pension plan is a critical factor in establishing liability under that State's wrongful discharge law." *Id.*, 498 U.S. at 140, 111 S.Ct. at 483. As a further ground for finding preemption, the Court found that the state wrongful discharge cause of action would conflict with the express and carefully crafted enforcement provisions found in the ERISA statute, specifically §§ 510 and 502(a)(3), (e), 29 U.S.C. §§ 1140, 1132(a)(3), (e). In describing the significance of § 502(a), the Court turned to one of its prior decisions, which had explained:

> [T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the

> federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

McClendon, 498 U.S. at 144, 111 S.Ct. at 485 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987)).

McClendon compels us to conclude that Anderson's wrongful discharge claim is preempted insofar as it is based on his refusal to carry out violations of ERISA, and reporting such violations to management. As in *McClendon*, such a claim depends on the existence of a pension plan, and therefore relates to an ERISA plan. Further, such a claim conflicts with the detailed and carefully balanced remedy provisions of ERISA. Section 502(a) provides remedies for participants, beneficiaries, and fiduciaries of ERISA plans. Anderson was both a participant and, given the allegations in his petition regarding his management of pension portfolios, a fiduciary.[1] In addition, as in *McClendon*, Anderson's "claim falls squarely within the ambit of ERISA § 510." 498 U.S. at 142, 111 S.Ct. at 485. Section 510 addresses discharges for exercising ERISA rights or for the purpose of interfering with

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[1] ERISA defines a participant as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . . " 29 U.S.C. § 1002(7). ERISA also provides that "a person is a fiduciary with respect to a plan to the extent . . . he exercises . . . any authority or control respecting management or disposition of its assets [or] he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has authority or responsibility to do so. . . . " *Id.* § 1002(21)(A).

the attainment of ERISA rights, as well as discharges for providing information or testimony relating to ERISA.[2]

Hence, we conclude that a state wrongful discharge cause of action based on a refusal to commit violations of ERISA and reporting such violations to management is preempted by ERISA, because such a claim relates to an ERISA plan and is expressly preempted by ERISA § 514, and because the cause of action would conflict with the enforcement provisions of §§ 502(a) and 510 of ERISA.[3]

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[2] Section 510 provides:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan [or] this subchapter . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan [or] this subchapter. . . . It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter. . . . The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

29 U.S.C. § 1140.

[3] The Sixth Circuit reached a similar conclusion in *Authier v. Ginsberg*, 757 F.2d 796 (6th Cir.), *cert. denied*, 474 U.S. 888, 106 S.Ct. 208, 88 L.Ed.2d 177 (1985). There, the plaintiff brought a state law wrongful discharge action, alleging that he was terminated for fulfilling his obligations under ERISA by writing a letter to plan participants. The court found the claim preempted, concluding that "allowing the remedies available to an ERISA fiduciary discharged for complying with ERISA to turn upon the state of his employment and a state court's interpretation of ERISA's provisions runs contrary to Congress' desire to establish a uniform federal law regulating pension plans." *Id.* at 802.

As we have previously noted, such a finding of preempting does not hinge on whether ERISA provides the remedy the plaintiff seeks or any remedy at all for the alleged wrong.[4]

A finding that a claim is preempted does not end our analysis, since preemption is raised as a defense and ordinarily federal question jurisdiction is determined by the well-pleaded complaint rule, which looks to the complaint in determining subject matter jurisdiction. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 62-64, 107 S.Ct. 1542, 1546, 95 L.Ed.2d 55 (1987). However, in *Taylor,* the Supreme Court held that the "complete preemption" doctrine applies to certain ERISA cases. Under this doctrine, "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character," and the case may be removed even if no federal claim is asserted in the complaint and federal preemption, raised as a defense, is the only issue of federal law implicated in the case. *Id.,* 481 U.S. at 62-64, 66-67, 107 S.Ct. at 1546, 1548. The Court held that causes of action within the scope of the civil enforcement provisions of ERISA § 502(a) are subject to

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[4] *Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321, 1333 (5th Cir.) ("The acknowledged absence of a remedy under ERISA's civil enforcement scheme . . . does not alter our conclusion. . . . [T]he lack of an ERISA remedy does not affect a pre-emption analysis."), *cert. denied,* ___ U.S. ___, 113 S.Ct. 812, 121 L.Ed.2d 684 (1992); *Hansen v. Continental Ins. Co.,* 940 F.2d 971, 979 (5th Cir. 1991) ("This Court has held that ERISA's preemption provision bars state law causes of action even though such preemption may leave a victim . . . without a remedy.").

the complete preemption doctrine and removable to federal court. *Id.*, 481 U.S. at 66-67, 107 S.Ct. at 1548.

In *Taylor*, the plaintiff was injured in a car accident. His employer had a disability plan covered by ERISA. When a dispute arose regarding plaintiff's benefits under the plan, he brought a state court suit seeking recovery of his disability benefits, as well as asserting claims for mental anguish, wrongful termination and wrongful failure to promote him. The Court held that, as a suit by a beneficiary to recover benefits from a covered plan, the suit fell directly under the civil enforcement provisions of ERISA and was therefore preempted. *Id.*, 481 U.S. at 62-64, 107 S.Ct. at 1546. It further held that the common law tort and contract claims all "related to" an ERISA benefit plan and were hence preempted under ERISA § 514(a), 29 U.S.C. § 1144(a). *Id.*

Applying the reasoning of *Taylor* to our case, we hold that Anderson's claim of demotion and termination for failing to commit acts in violation of ERISA and reporting such violations falls within the scope of the civil enforcement provision of ERISA, and hence created removal jurisdiction.[5] Section 502(a) creates a cause of action for any participant, beneficiary, or fiduciary seeking to enjoin any act which violates any provision of ERISA, or seeking

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[5] The same conclusion was reached in the case relied upon by the district court, *McLean v. Carlson Companies, Inc.*, 777 F.Supp. 1480 (D.Minn.1991). The *McLean* court found that a wrongful discharge action alleging that the employee had been discharged for reporting to her employer violations of federal law in connection with the administration of the employer's employee benefit plan was removable to federal court. *Id.* at 1483.

recovery to the plan for any losses resulting from a fiduciary's breach of his responsibilities, obligations, or duties imposed by ERISA. 29 U.S.C. §§ 1109, 1132(a)(2)-(3).[6] ERISA § 510 broadly prohibits the termination or other adverse treatment of participants and beneficiaries for exercising their ERISA rights or for the purpose of interfering with the attainment of such rights, and prohibits the discharge or other adverse treatment of any person because he has given information or testimony relating to ERISA. 29 U.S.C. § 1140. Further, this section expressly provides that the § 502 civil enforcement provisions of ERISA "shall be applicable to the enforcement of this section." *Id.*

One novel aspect of this case is that Anderson asserted that the ERISA violations he reported and refused to commit were only some of the illegal acts which led to his discharge. He also alleged, for example, insider trading and other violations of laws and regulations enforced by the Securities and Exchange Commission. However, the allegations of these other wrongful acts does not alter our analysis.[7] To hold otherwise, we

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[6] Section 502(a) is not confined to enforcing claims for benefits due under ERISA plans. As the Supreme Court explained in *McClendon*, "there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek 'pension benefits.' . . . Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits." 498 U.S. at 145, 111 S.Ct. at 486.

[7] Of course, the general federal removal statute allows an entire case to be removed so long as federal question jurisdiction exists with respect to a "separate and independent claim or cause of action" asserted in the complaint. 28 U.S.C. § 1441(c). In our case, however, it does not appear that any of Anderson's

believe, would fail to recognize that the ERISA preemption provision is " 'deliberately expansive' . . . [and] is to be construed extremely broadly." *Corcoran*, 965 F.2d at 1328 (citation omitted). "The Supreme Court has consistently emphasized the expansiveness of the 'relate to' standard and its purpose of establishing the regulation of pension plans as an exclusively federal concern." *Christopher v. Mobil Oil Corp.*, 950 F.2d 1209, 1217 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 68, 121 L.Ed.2d 35 (1992). Finally, we note that Anderson's deletion of references to ERISA by amending his complaint did not divest the district court of jurisdiction to decide the summary judgment motions.[8]

AFFIRMED.

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causes of action are premised entirely on the alleged ERISA violations described in his original petition.

[8] *Brown v. Southwestern Bell Tel. Co.*, 901 F.2d 1250, 1254 (5th Cir.1990) ("[W]hen there is a subsequent narrowing of the issues such that the federal claims are eliminated and only pendent state claims remain, federal jurisdiction is not extinguished."); *In re Carter*, 618 F.2d 1093, 1101 (5th Cir.1980) ("It is a fundamental principle of law that whether subject matter jurisdiction exists is a question answered by looking to the complaint as it existed at the time the petition for removal was filed. . . . Indeed, it has often been stated that the plaintiff cannot rob the district court of subject matter jurisdiction by electing to amend away the grounds for federal jurisdiction."), *cert. denied*, 450 U.S. 949, 101 S.Ct. 1410, 67 L.Ed.2d 378 (1981).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE RAYMOND (ANDY) ANDERSON,	)	
Plaintiff,	)	CIVIL ACTION NO.
VS.	)	3:91-CV-1489-G
ELECTRONIC DATA SYSTEMS CORP., ET AL.,	)	
Defendant.	)	

MEMORANDUM ORDER

(Filed Dec. 2, 1992)

Before the court is the motion for summary judgment and for sanctions of defendant Douglas M. Crow ("Crow"). For the reasons stated below, Crow's motion for summary judgment is granted and his motion for sanctions is denied.

I. BACKGROUND

This action arises from the decision of defendant Electronic Data Systems ("EDS") to terminate, on August 23, 1989, the employment of plaintiff George Raymond Anderson ("Anderson"). Anderson alleges that Crow and the other defendants terminated his employment at EDS in retaliation for his refusal to participate in illegal activities and for his accusations of irregular conduct against

Crow, his superior in the organization. Anderson also seeks damages for emotional distress he claims to have suffered at the hands of defendants as a result of his refusal to perform the requested illegal acts.

Anderson further asserts that defendants have tortiously [sic] interfered with his ability to find gainful employment since his termination from EDS. Specifically, he maintains that Crow tortiously [sic] interfered with his attempts to find employment elsewhere by contacting potential future employers and discouraging them from extending offers of employment to him.

Crow filed this motion for summary judgment on November 15, 1991. On December 5, 1991, Anderson filed a timely response accompanied by his sworn affidavit requesting that the court grant him an extension of time so that he could better respond to Crow's motion. Not only did this court grant Anderson an initial extension, it also granted him a second extension on August 5, 1992. In its August 5 order, the court ordered Anderson to file any response no later than September 8, 1992. As of the date of this order, however, Anderson has not filed a response.

II. ANALYSIS

A. Legal Standard for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled

to judgment as a matter of law. Fed. R. Civ. P. 56(c).[1] "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues. *See Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Id.* at 323-24. To carry this burden, the opponent must do more than simply show some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Instead, he must show that the evidence is sufficient to support a resolution of the factual issue in his favor. *Anderson*, 477 U.S. at 249. All of the evidence must be viewed, however, in a light most favorable to the motion's opponent. *Id.* at 255 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)). Summary judgment is properly entered against a party if after adequate time for discovery, he fails to establish the existence of an element essential to his case and as to which he will bear the burden of proof at trial. *Celotex*, above, 477 U.S. at 322-23.

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[1] The disposition of a case through summary judgment "reinforces the purpose of the Rules, to achieve the just, speedy, and inexpensive determination of actions, and, when appropriate, affords a merciful end to litigation that would otherwise be lengthy and expensive." *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1197 (5th Cir. 1986).

B. Anderson's Claims

1. Wrongful Termination

Anderson first allegation is that Crow wrongfully terminated his employment at EDS. To support this allegation, Anderson must provide some evidence that Crow played a role in his firing. *See Crawford & Company v. Garcia*, 817 S.W.2d 98, 102 (Tex. App. – El Paso 1991, writ denied) (only a party who actually conducts or recommends termination can be guilty of wrongful discharge). Such evidence is conspicuously absent from Anderson's response. In fact, the affidavits of both Crow and Don W. Ulm, Anderson's immediate supervisor at the time of his firing, state that Ulm made the decision to terminate Anderson. These sworn statements verify that Crow played no role in the decision to dismiss Anderson. Absent *any* evidence to the contrary, Crow is entitled to judgment as a matter of law on Anderson's claim of wrongful termination.

2. Tortious Interference

In his complaint, Anderson alleges that Crow tortiously interfered with his prospective business and contractual relationships. "To prevail on a claim of tortious interference with business relations under Texas law, a plaintiff must prove (1) the existence or prospect of a contract, (2) an intentional and willful act interfering with the contract that was calculated to cause damage to the plaintiff, and (3) damages." *Kiepfer v. Beller*, 944 F.2d 1213, 1220 (5th Cir. 1991); *see also Sterner v. Marathon Oil Company*, 767 S.W.2d 686, 689 (Tex.1989) (Texas law protects

prospective, as well as existing, contracts from interference).

In support of his claim for tortious interference, Anderson relates conversations that took place during two separate job interviews he had in the wake of his dismissal from EDS. During the course of those interviews, John F. Hughes and J. Abbot Sprague – each the representative of a prospective employer – commented to Anderson that they knew Crow and would be contacting him before making a hiring decision. Although both interviews went well, Anderson was not offered either job. He opines that his failure to receive a job offer from either Hughes or Sprague must have been the result of Crow's tortious interference.

Anderson offers no evidence, however, to support his theory that Crow interfered with his post-EDS job opportunities. To the contrary, affidavits of both Hughes and Sprague state unequivocally that neither man ever had any contact with Crow regarding Anderson's employment. Anderson's speculation notwithstanding, the evidence fails, as a matter of law, to show that Crow intentionally or willfully interfered with Anderson's quest for future employment. Accordingly, Crow is also entitled to judgment on this claim.

3. Infliction of Emotional Distress

Anderson further alleges that Crow negligently or intentionally inflicted emotional distress on him in retaliation for his refusal to perform illegal acts. Texas is one

of many states recognizing the tort of intentional infliction of emotional distress. *Duty v. General Finance Company*, 273 S.W.2d 64, 65-66 (Tex. 1954). "To prevail on a claim for intentional infliction of emotional distress, Texas law requires the plaintiff to prove the following: (1) that the defendant acted intentionally or recklessly, (2) that the defendant's conduct was extreme and outrageous, (3) that the actions of the defendant caused the plaintiff emotional distress, and (4) that the emotional distress suffered was severe." *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir. 1992) (citing *Tidelands Auto Club v. Walters*, 699 S.W.2d 939, 942 (Tex. App. – Beaumont 1985, writ ref'd n.r.e)).

Anderson has produced no evidence to support his claim that Crow intentionally caused him emotional distress. In response to Crow's interrogatory regarding proof of his emotional distress claim, Anderson merely referred to his answer to an earlier interrogatory in which he listed numerous illegal acts that Crow allegedly asked him to perform while both were working at EDS.[2]

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[2] "*Interrogatory No. 16*

Describe in detail all facts which support or tend to support your allegation that Crow negligently or intentionally sought to inflict 'emotional distress to Anderson in retaliation of Anderson's refusal to participate in illegal activities at Crow's direction and reporting of Crow's own illegal or irregular activities . . . '

Answer:

See response to Interrogatory No. 5."

Although Anderson's complaint asserts that Crow inflicted the emotional distress *after* Anderson refused to perform the allegedly illegal acts, his interrogatory answer indicates that

To prevail on this claim, Anderson must show that Crow did something extreme or outrageous to him to punish him for his refusal to engage in the illegal acts. Anderson posits that Crow made several unkind statements to him suggesting that Anderson be "a good soldier or no soldier at all," and threatening Anderson with punishment for failing to be loyal to him. *See* Affidavit of George Raymond Anderson, pp. 12-13. Additionally, Anderson claims that Crow sent him a rude and threatening postcard in the mail. Even assuming that Crow did engage in this conduct, the court is unable to say that it was extreme and outrageous.[3] *See Horton v. Montgomery Ward & Co., Inc.*, 827 S.W.2d 361, 369 (Tex. App. – San Antonio 1992, writ denied) ("[i]t is for the court to first determine whether the conduct may reasonably be regarded as so extreme and outrageous as to allow recovery"); *Guzman v. El Paso Natural Gas Company*, 756 F. Supp. 994, 1002 (W.D. Tex. 1990) (same). *Accord, Ramirez v. Allright Parking El Paso, Inc.*, 970 F.2d 1372, 1375-77 (5th Cir. 1992) (reversing judgment for plaintiff on intentional infliction of emotional distress claim because employer's

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Crow did nothing more than ask Anderson to engage in illicit conduct. Even if it be assumed (most favorably to Anderson) that the conduct solicited by Crow was in fact illegal, it is nonetheless obvious that Crow's request, which *preceded* Anderson's refusal, could not possibly be *in retaliation for* that refusal.

[3] Liability for intentional infliction of emotional distress "does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Restatement (Second) of Torts §46; *see also Wilson v. Monarch Paper Company*, 939 F.2d 1138, 1143 (5th Cir. 1991). Even conduct which may be illegal in an employment context may not be considered extreme and outrageous. *Wilson*, 939 F.2d at 1143.

conduct not extreme and outrageous); *Johnson v. Merrell Dow Pharmacenticals, [sic] Inc.*, above, 965 F.2d at 33-34 (affirming summary judgment against employee on intentional infliction of emotional distress claim because employer's behavior not extreme and outrageous). Moreover, Anderson has presented no evidence that Crow's conduct has actually caused him to suffer emotional distress, a key element in this cause of action. *K.B. v. N.B.*, 811 S.W.2d 634, 640 (Tex. App. – San Antonio 1991, writ denied), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1963 (1992).

Nor can Anderson prevail on his claim that Crow negligently inflicted emotional distress on him. *See Conaway v. Control Data Corporation*, 955 F.2d 358, 360-61 (5th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 186 (1992) (Texas Supreme Court has not yet recognized a separate cause of action in the employee/employer relationship for negligent infliction of emotional distress).

III. CONCLUSION

The court finds no evidence to support Anderson's claims against Crow for wrongful discharge, tortious interference, or intentional or negligent infliction of emotional distress. Accordingly, Crow's motion for summary judgment is **GRANTED.**

The court finds, however, no violation of Rule 11, F.R. Civ. P. Accordingly, Crow's motion for sanctions under that rule is DENIED.

SO ORDERED.

December 2, 1992.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GEORGE RAYMOND (ANDY) ANDERSON, Plaintiff,	)	CIVIL ACTION NO.
VS.	)	CA 3-91-1489-G
ELECTRONIC DATA SYSTEMS CORP., ET AL., Defendants.	)	

ORDER

(Filed Jan. 7, 1992)

Plaintiff's motion to remand is **DENIED.** *See McLean v. Carlson Companies, Inc.*, No. Civ. 3-91-453, 1991 U.S. Dist. LEXIS 17156 (D. Minn. Nov. 25, 1991).

SO ORDERED.

January 7, 1992.

/s/ A. Joe Fish
A. JOE FISH
United States District Judge